86-1163

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

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Vera Rogers Jones, *et al.*,

Petitioners,

v.

The United States of America,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

—o—

RICHARD DAUPHINAIS
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036
(202) 785-4166

Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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QUESTIONS PRESENTED

1. Whether petitioners' claims for damages relating to the temporary loss of their trust land could have accrued before:

   a. it was determined that they owned the land and the land was returned to them;

   b. the damages they were otherwise entitled to in prior litigation were reduced because of respondent's inaction?

2. Whether the statute of limitations ever began to run on petitioners' claims for damages relating to the temporary loss of their trust land where;

   a. they never lost title to the land;

   b. the trust relationship between petitioners and respondent was never terminated or repudiated?

LIST OF PARTIES

The parties to the proceedings below were Vera Rogers Jones, the Estate of Ada Rogers Graham, the Estate of Hattie Davis Rogers and the United States of America.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Petitioners, Vera Rogers Jones, the Estate of Ada Rogers Graham and the Estate of Hattie Davis Rogers request the issuance of a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit in this proceeding.

—o—

OPINIONS BELOW

The Opinion of the Court of Appeals for the Federal Circuit, filed September 23, 1986 and amended September 24, 1986 and October 8, 1986, is reported at 801 F.2d 1334. It is reprinted in the Appendix to this Petition at pages A-1 through A-6.

The December 9, 1985 Opinion of the Claims Court (A-7 through A-16) is reported at 9 Cl.Ct. 292.

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JURISDICTION

The Judgment and Opinion of the Court of Appeals were entered on September 23, 1986. A Petition for Rehearing and a Suggestion for Rehearing *In Banc* were timely filed on October 7, 1986. The Petition for Rehearing was denied on October 21, 1986 (A-18) and the Suggestion for Rehearing *In Banc* was declined on November 5, 1986 (A-19). This petition is filed within ninety days of the October 21, 1986 denial of the Petition for Rehearing.

The Court has jurisdiction to review the judgment of the Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1254(1).

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STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 2501 and 25 U.S.C. § 348. Those statutes are set out, in pertinent part, in the Appendix at A-21.

STATEMENT OF THE CASE

This case was filed as a result of the outcome of federal litigation in Idaho. *Brooks v. Nez Perce County,* No. 2-72-27 (D. Idaho). In *Brooks,* petitioners received only one-half the damages they were otherwise entitled to from Nez Perce County because of the failure of the United States to fulfill its statutory responsibilities.

Petitioners then sought the damages that were withheld in *Brooks* from the United States in this suit. The Claims Court dismissed the suit holding that the statute of limitations, 28 U.S.C. § 2501, had run. (A-7 through A-16). On appeal, the Federal Circuit affirmed on the same grounds. (A-1 through A-6). A more detailed statement of the events leading up to the *Brooks* litigation and this suit follows.

I. HISTORICAL FACTS

The Nez Perce Indian Reservation was allotted under the General Allotment Act, 24 Stat. 388, 25 U.S.C. §§ 331-390, in the 1890's. The allotments were held in trust for the Indians.

In 1895, a trust allotment was made to George Corbett. He died in 1909 and the allotment passed to Hattie Davis, the mother of petitioner Vera Rogers Jones and Ada Rogers Graham.[1] In 1911, the United States Bureau of Indian Affairs (hereafter BIA) sold the allotment on Hattie's behalf. The BIA used the proceeds of the sale to purchase Lot 1, Block 8, Toyaulkt's Addition (hereafter Lot 1)

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[1]In addition to Vera Jones, the Estates of Ada Rogers Graham and Hattie Davis Rogers are also petitioners in this Court.

in the town of Lapwai, Idaho for Hattie. Lot 1 was held in trust for the sole use and benefit of Hattie.

With the remainder of the proceeds, the BIA had a commercial building constructed on Lot 1 and purchased another piece of property for Hattie's home. The back of the building on Lot 1 was leased out for the operation of a bank. In the front of the building, Hattie ran a pool hall and card room. The BIA estimated in 1914 that Lot 1 provided Hattie with a return on her investment of about 15% annually.

Although Lot 1 was trust property, Nez Perce County, Idaho attempted to levy a tax on it. In 1916, the United States filed suit on Hattie's behalf seeking a decree voiding the County's attempt to tax Lot 1 and enjoining any future attempts. *United States v. Nez Perce County,* Civil No. 459 (D. Idaho). On May 18, 1918, the federal district court in Idaho quieted title to Lot 1 in the United States in trust for Hattie, voided the County tax levies and enjoined future levies.

Despite the decree, the County again began to levy taxes on Lot 1 in 1922. The United States acquiesced in those levies and a tax deed was entered for Lot 1 in 1928. The County sold Lot 1 to a non-Indian in 1937. The United States did nothing to stop or invalidate the tax sale. The purchaser and his successors-in-interest possessed and used Lot 1 from 1937 to 1979.

Hattie Davis died in 1964, dispossessed of Lot 1 as she had been for the preceding 37 years. Her daughters, Vera Rogers Jones and Ada Rogers Graham, also members of the Nez Perce Tribe, succeeded to her interest in Lot 1. Hattie, and later her daughters, attempted to get the United

States to do something about the loss of Lot 1. They were unable to get a satisfactory response from the United States.

II. BROOKS LITIGATION

In 1972, petitioner, Vera Jones (then Vera Brooks), filed suit attempting to establish that the 1937 tax sale of Lot 1 was invalid. *Brooks v. Nez Perce County, supra.* The case was dismissed on jurisdictional grounds in 1975. *Brooks v. Nez Perce County,* 394 F.Supp. 869 (D. Idaho 1975). The Ninth Circuit refused to review the dismissal. The case was then refiled naming the United States as a defendant. The United States realigned as a plaintiff in 1977.

On October 15, 1979, the *Brooks* court granted partial summary judgment quieting title to Lot 1 in the United States as trustee for the petitioners. However in June 1980, the court held that, because of the United States' delay, the County was not liable in damages to the United States or petitioners. On appeal, the Ninth Circuit found that laches did not preclude an award of damages but that "lack of diligence by the government in exercising its role as trustee may be weighed by the district court in calculating damages." *Brooks v. Nez Perce County,* 670 F.2d 835, 837 (9th Cir. 1982).

On remand, the Idaho district court found that petitioners had suffered damages in the amount of $216,000 (the fair rental value of Lot 1 for the years 1937 to 1979) but awarded only half that amount stating:

> Certainly the [U.S.] government was most dilatory in the exercising of its role as trustee in this matter and this court cannot in good conscience assess full

> damages for the present value of past income on the property against the taxpayers of Nez Perce County. The court finds that by reason of the foregoing, net damages should be decreased by at least 50 percent rounded off to a damage sum for present value of past income in the sum of $108,000.

Brooks, supra, No. 2-72-27.

III. THIS CASE

On November 15, 1984, petitioners filed this suit for the damages they were entitled to but did not receive in the *Brooks* litigation. The Claims Court had jurisdiction of the case under 28 U.S.C. § 1491. The United States responded to the suit by moving to dismiss on statute of limitations grounds. The Claims Court granted the motion on December 10, 1985. A-7 through A-16.

Petitioners appealed to the Federal Circuit. That court affirmed the dismissal of petitioners' claims. A-1 through A-6.

REASONS FOR GRANTING THE WRIT

I. THE CORRECT CONSTRUCTION AND APPLICATION OF 28 U.S.C. § 2501 IS AN IMPORTANT ISSUE

The Claims Court has jurisdiction over claims "founded either upon the Constitution, or any Act of Congress . . ." 28 U.S.C. § 1491. However, such claims must be filed within six years of the time they accrue. 28 U.S.C. § 2501. Thus, although the United States has waived its sovereign immunity for claims under § 1491,

§ 2501 conditions that waiver on a timely filing of the claim.

The correct construction and application of § 2501 is therefore important to the administration of the Claims Court. Because of the similarity between the language of § 2501 and 28 U.S.C. § 2401(a), the interpretation of § 2501 is also important to the administration of claims against the United States in the district courts. This Court has recognized the importance of issues such as those involved in this case.

In *United States v. Mottaz,* 476 U.S. —, 106 S.Ct. 2224 (1986), a Chippewa Indian sued the United States alleging that the Bureau of Indian Affairs had illegally sold her interest in trust allotments to the Forest Service. She sought damages measured by the fair market value of the allotments. The Federal District Court for the District of Minnesota dismissed the case saying it was barred by the limitations period in § 2401(a).

On appeal, the Eighth Circuit reversed. *Mottaz v. United States,* 753 F.2d 71 (8th Cir. 1985). The Court of Appeals construed the claim for damages as equivalent to a claim for return of the land. *Id.* at 75. And, therefore because the land was subject to federal restraints on alienation, there could be no accrual of the claim so as to trigger § 2401(a). *Id.* at 74.

The United States then raised the argument that the claim was barred by the limitations period for quiet title suits against the United States. 28 U.S.C. § 2409a(f). The Court of Appeals declined to change its ruling and the government sought review in this Court. Certiorari was granted to consider whether the Indian's claim was

barred under either § 2401(a) or § 2409a(f), "because of the importance of the issue". *Mottaz, supra,* 474 U.S. at —, 106 S.Ct. at 2229.[2]

As in *Mottaz,* this case involves a claim by the heirs of an Indian allottee, petitioners, regarding the loss of a trust allotment. Unlike *Mottaz,* however, there is no question that petitioners have title to the allotment in question. This case is solely for damages and therefore raises the question suggested in but left unanswered by *Mottaz;* when, if ever, a damages claim based upon the government's failure to obtain the return of illegally alienated land accrues. The Court should review this important question.

II. THE DECISIONS BELOW ON THIS IMPORTANT ISSUE CONFLICT WITH DECISIONS OF THIS COURT, THE COURT OF CLAIMS AND OTHER FEDERAL COURTS

In their Complaint, petitioners asserted two causes of action relating to the 42 year loss of their land. The first was a breach of fiduciary and statutory duties and the second was an uncompensated temporary taking. When the United States moved to dismiss, petitioners argued that although their land was illegally sold in 1937, their claim against the United States did not accrue until 1979, at the earliest, when the land was returned to them. In the althernative, petitioners argued that because of the trust relationship between the government and petitioners as to Lot 1 and the restraint on alienation to which Lot 1

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[2]This Court decided that the claim was governed by the Quiet Title Act and barred under § 2409a(f). *Id.*

was and is subject,[3] the statute of limitations never began to run on their claims.

As to the breach of duties claim, the Courts below said that the breaches occurred long ago and that petitioners knew or should have known of them more than six years before November 1984 when this case was filed. A-11 through A-12; A-4 through A-5. The taking claim accrued at the time of the taking and that too occurred more than six years before this case was filed. A-4. Although the lower Courts were not very specific as to the exact dates of accrual, it appears likely that they were focusing on 1937 when Nez Perce County sold Lot 1. Because, however, of the status of Lot 1 and the events subsequent to 1937, especially the *Brooks* litigation, accrual did not occur in 1937. The decisions of the lower courts in this case are in direct conflict or conflict in principle with decisions of this Court, the Court of Claims and other federal Courts.

A. Under Decisions of this Court and the Court of Claims, Petitioners' Temporary Taking Claim Did Not Accrue Until 1979 When Their Land Was Returned to Them.

Under the doctrine announced in *United States v. Dickinson*, 331 U.S. 745 (1947), petitioners' taking claim did not accrue until their damages were ascertainable. That is, until the extent and duration of the taking was fixed. In this case, that point was not reached until Lot 1 was returned to petitioners.

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[3]Lot 1 continues to be held in trust by the United States and is still subject to the restrictions of 25 U.S.C. § 348, A-21.

In *Dickinson,* the plaintiffs filed inverse condemnation suits based upon the flooding of their land. The flooding was occasioned by the government's operation of the Winfield Dam. The suits were filed more than six years after operation of the Dam began but less than six years after the impoundment was raised to its highest level. The threshold question in this Court was whether the plaintiffs had complied with the statute of limitations.

The United States contended that the plaintiffs' claims had accrued when their land was first submerged. This Court disagreed. The Court noted that this was a situation in which the government left the taking to physical events "thereby putting on the owners the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could no longer be in controversy." *Dickinson, supra,* 331 U.S. at 748. Requiring the landowners to sue at the start of the inundation would result in uncertainty over damages and would put the plaintiffs at the risk of "splitting" their cause of action. *Id.* Thus, the situation required that the plaintiffs' suit be postponed until the conditions became stabilized and "the consequences of inundation [had] so manifested themselves that a final account may be struck." *Id.* Because the suits were filed within six years of the completion of the inundation, they were timely.

In this case, it was only in the *Brooks* litigation that the United States first took an unequivocal position as to Lot 1 and took the action on that position that resulted in the return of Lot 1 in 1979. Before *Brooks,* the government's failure to take a firm stand created uncertainty. The petitioners could not sue the United States before then because until Lot 1 was returned to them, they would have risked "splitting" their cause of action against the govern-

ment and the full extent of damages would not have been ascertainable. Under *Dickinson,* the petitioners could, and as a practical matter had to, wait until the consequences of the government's inaction had so manifested themselves that a final account could be struck. That is, when Lot 1 was returned to them in 1979.

The Court of Claims, in fact, came to a similar conclusion in a case very much like this one. In *Castro v. United States,* 500 F.2d 436, 205 Ct.Cl. 534 (1974), the Court dealt with a case arising out of the United States' 1944 invasion of Saipan and occupation of private lands there. In 1968, the plaintiff was permitted to return to his lands. He filed suit in October of that year asserting a temporary taking claim. The Court held that the claim accrued, not when the taking began in 1944, but in 1968. The Court noted that the plaintiff had no way of knowing, before 1968, the duration of his exclusion from occupancy. *Id.,* 500 F.2d at 442. His taking cause of action therefore did not accrue until then. And so, he could "wait until the property was returned to him by defendant in 1968 before he brought suit . . ." *Id.; Accord Oro Fina Consolidated Mines v. United States,* 92 F. Supp. 1016, 118 Ct.Cl. 18 (1950); *cert den.* 341 U.S. 948 (1951); *Silverberg v. United States,* 155 Ct.Cl. 436 (1962). Likewise here, it was not until Lot 1 was returned to petitioners in 1979 that the instant claim against the United States accrued.

B. Under Decisions of this Court and the Court of Claims, Establishment of Petitioners' Title to Lot 1 in the Brooks Litigation was a Condition Precedent to this Suit.

Essentially, petitioners' claims arise from the government's failure to obtain the return of Lot 1. The petitioners allege that the claims have merit because Lot 1 was held in trust for them by the United States which therefore had a fiduciary duty to protect their interests. Clearly the only way in which the petitioners could make those claims is by establishing their beneficial title to Lot 1. Before that was accomplished, the petitioners did not have viable causes of action against the United States. *See Fehl v. United States,* 59 Ct.Cl 682, 683 (1924); *Bayshore Resources Co. v. United States,* 2 Cl.Ct. 625, 636 (1983).

Because, however, the land was in the possession of others, those persons were indispensable parties to any suit by the petitioners to establish title to Lot 1. *See e.g. McShan v. Sherrill,* 283 F.2d 463 (9th Cir. 1960). And, any suit involving the people in possession could not have been filed in the Court of Claims (or Claims Court). *Yaist v. United States,* 656 F.2d 616, 622 (Ct.Cl. 1981). Even though the petitioners could, as they did, sue both the people in possession and the United States in federal district court, their claim against the United States in that forum was limited to $10,000. 28 U.S.C. § 1346(a)(2); *Amalgamated Sugar Co. v. Bergland,* 664 F.2d 818 (10th Cir. 1981). Thus, there is no way the petitioners could have filed the instant claims without proceeding just as they did. The *Brooks* litigation was a condition precedent to this suit.

In comparable circumstances, courts have decided that where a prior determination is required in order for a claimant to file suit, the statute of limitations does not begin to run until the prior determination is made. *Crown Coat Front Co. v. United States,* 386 U.S. 503 (1967); *Nager Electric Company, Inc. v. United States,* 368 F.2d 847, 177 Ct.Cl. 234 (1966). The prior determination of the petitioners' title to Lot 1 in *Brooks* was required here. The determination established an important element in the petitioners' cause of action against the United States. Before their title was established, the petitioners could not honestly allege what they needed to allege in a complaint against the government and their claims would have been subject to a motion to dismiss in the Court of Claims or Claims Court. *Fehl, supra; Bayshore, supra.* The claim therefore accrued, at the earliest, when petitioners' title to Lot 1 was established in the *Brooks* litigation.[4]

C. Under Decisions of the Federal Courts, Petitioners' Claim, Which Sounds in Indemnity, Did Not Accrue Until the 1983 Damages Decision in Brooks

The petitioners lost Lot 1 to non-Indians at the hands of Nez Perce County. Despite its trust relationship with petitioners and the concomitant duties, the United States allowed the loss to occur and then did nothing to recover

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[4]Alternatively, it was not until the rather unique 1983 damages decision in *Brooks* that the petitioners' causes of action arose. It was only at that point that a right of action against the United States was established and so only then that their claims accrued. Dore v. Kleppe, 522 F.2d 1369, 1373 (5th Cir. 1975); United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353, 1358 (5th Cir. 1972).

the land. In response, the petitioners filed the *Brooks* litigation against the County, the non-Indians and the United States. Eventually the government acknowledged its role as guardian and trustee for the petitioners and joined in their claims against the County and the people in possession. There was a favorable title decision, a finding that the petitioners were entitled to a certain amount of damages and, in 1983, a reduction of the damages award because of the government's inaction in exercising its role as trustee. The petitioners sue here for the Lot 1 damages that they didn't receive from the County in *Brooks*.

Where a person is compelled to pay damages occasioned by another, an implied indemnity cause of action can be maintained. In this case, petitioners sue the government for that which they were forced, in effect, to pay the County. Petitioners' claim sounds in indemnity.

The rule as to indemnification causes of action is clear. A claim "against the United States for indemnity does not 'accrue', within the meaning of the statute [of limitations], until the party claiming indemnity has paid the injured person." *Keleket X-Ray Corporation v. United States,* 275 F.2d 167, 169 (D.C. Cir. 1960); *accord Chicago, Rock Island & Pacific Ry. Co. v. United States,* 220 F.2d 939, 942 (7th Cir. 1955); *United States Lines, Inc. v. United States,* 470 F.2d 487, 489 (8th Cir. 1972); *Central Rivers Towing v. City of Beardstown,* 750 F.2d 565, 571-72 (7th Cir. 1985). "Such a rule ensures that the loss is distributed among those responsible for the harm . . . " *Central Rivers Towing, supra* 750 F.2d at 572; *Thornton v. Town of Hull,* 515 F.Supp. 715, 716 (D. Mass. 1981).

Thus, petitioners' claims accrued, at the earliest, in 1983. It was then that half of petitioners' damages award in *Brooks* was set-off in favor of the County because of the failures of the United States.[5]

D. Under Decisions of this Court, the Statute of Limitations on Petitioners' Claims Was Not Triggered Because of the Existing Trust Relationships Between the United States and Petitioners and Because of the Statutory Restraints on Alienation Relating to Lot 1.

1. Lot 1 was held by the United States for petitioners pursuant to 25 U.S.C. § 348. In pertinent part, § 348 states that the United States held Lot 1 ". . . in trust for the sole use and benefit . . ." of Hattie and her children and ". . . if any conveyance shall be made of [Lot 1], or any contract made touching the same, before expiration of the [trust period], *such conveyance or contract shall be absolutely null and void* . . ." (Emphasis added) Thus, the County's sale of Lot 1 to non-Indians had no legal effect. In fact, under the clear language of § 348, nothing could be done to give effect to that transaction.

This Court came to that conclusion in *Ewert v. Bluejacket*, 259 U.S. 129 (1922). In that case, Indians brought suit to concel conveyances made in violation of a statutory

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[5]In the alternative, the United States had a continuing duty to obtain the return of Lot 1 and its failure to do so until 1979 resulted in a continuing injury to the petitioners. *See e.g.* Gross v. United States, 676 F.2d 295, 300 (8th Cir. 1982). Petitioners' claim based upon a continuing breach therefore did not accrue until 1979, at the earliest, or, more likely, when the *Brooks* litigation was complete in 1983. Terterling v. United States, 334 F.2d 250, 167 Ct. Cl. 331 (1964).

prohibition on alienation and to obtain accounting of rents and royalties. The Supreme Court affirmed the lower courts' cancellation of some of the conveyances holding that laches did not bar the suit.

> [Laches], developed and designed to protect good-faith transactions against those who have slept on their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the right of Indian wards in lands subject to statutory restrictions.

Id. at 138.

In this case, petitioners' claim to the fair rental value of Lot 1 is the equivalent to a claim for the land itself. Unless the petitioners receive the full fair rental value, a part of their loss of Lot 1 has been partially validated in violation of § 348. Thus, because the petitioners always retained title to Lot 1, the statute of limitations on the instant claims was never triggered. See *Mottaz v. United States, supra,* 753 F.2d at 74-75, *rev'd on other grounds United States v. Mottaz, supra,* 476 U.S. —, 106 S.Ct. 2224.

2. The "universal rule" is that the statute of limitations "does not run against a beneficiary in favor of a trustee until the trust is repudiated and the fiduciary relationship is terminated." *Manchester Band of Pomo Indians, Inc. v. United States,* 363 F.Supp. 1238, 1249 (N.D. Cal. 1973); *see also United States v. Taylor,* 104 U.S. 216 (1881); *Russell v. United States,* 37 Ct.Cl. 113 (1902); *Wayne v. United States,* 26 Ct.Cl. 274 (1891). There was no such repudiation or termination in this case. As noted earlier, the United States took the position in 1916 and again in the *Brooks* litigation that it held Lot 1 in trust for

petitioners. Therefore under the "universal rule", the statute of limitations did not begin to run on the petitioners' claims.[6]

By joining the petitioners in the *Brooks* litigation, the United States has acknowledged that it was guilty of misfeasance. It would be intolerable to accept the proposition that where, as here, such an admission has been made, the United States, the petitioners' trustee, can avoid liability by waiting more than six years before doing something about it. Therefore the limitations period has not been triggered as to the petitioners' breach of trust claims.

—o—

CONCLUSION

Petitioners lost their land through the misfeasance of the United States. With the help of the government, they were eventually able to obtain the return of Lot 1. But, because the United States had delayed so long in fulfilling its duties to petitioners, the damages they were otherwise entitled to were reduced. Based upon that delay, petitioners now seek the remainder of the damages from the United States.

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[6]Although the United States breached its duties to petitioners, the failure of a trustee to carry out his duties, as opposed to his claiming the trust corpus as his own, is not a repudiation that starts the limitations period running. *See e.g.* O'Steen v. Wineberg, 640 P.2d 28, 34 (Wash. App. 1982) (the transfer of trust assets to third parties, along with other breaches, were not sufficient to constitute an "unequivocal disavowal of the trust . . .").

That claim only came about because of the results in the *Brooks* litigation. It depends upon the 1979 title decision in that case and could only be asserted against the United States with the 1983 damages decision there.

Hattie Rogers, her children, Vera Rogers Jones and Ada Rogers Graham, and her grandchildren have persevered in a long struggle for justice. They were required to being that struggle with the *Brooks* litigation. They achieved a degree of success there and now seek the final measure. The lower courts were incorrect in deciding that the continuance of their quest is barred by the statute of limitations.

The decisions of the lower courts should be reversed and the case remanded for further proceedings on petitioners' claims.

Respectfully submitted,

RICHARD DAUPHINAIS
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036
(202) 785-4166

Counsel of Record of Petitioners

January 1987

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

VERA ROGERS JONES, THE ESTATE
OF ADA ROGERS GRAHAM, and
THE ESTATE OF HATTIE DAVIS
ROGERS,

Appellants,

v. Appeal No. 86-897

THE UNITED STATES,

Appellee.

Richard Dauphinais, of the Native American Rights Fund, Washington, D.C., argued for appellants.

J. Carol Williams, attorney for the Department of Justice, Washington, D.C., argued for appellee. With her on the brief were *F. Henry Habicht, II,* Assistant Attorney General, *Patricia L. Weiss* and *David C. Shilton,* attorneys, Department of Justice, Washington, D.C.
Appealed from: U.S. Claims Court
Chief Judge Kozinski

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

VERA ROGERS JONES, THE ESTATE
OF ADA ROGERS GRAHAM, and
THE ESTATE OF HATTIE DAVIS
ROGERS,

Appellants,

v. Appeal No. 86-897

THE UNITED STATES,

Appellee.

DECIDED: September 23, 1986

Before RICH, BALDWIN, and BISSELL, *Circuit Judges*.
BISSELL, *Circuit Judge*.

Plaintiffs Vera Rogers Jones, the Estate of Ada Rogers Graham, and the Estate of Hattie Davis Rogers (collectively Jones), appeal from the judgment of the United States Claims Court, 9 Cl. Ct. 292 (1985), granting the motion of the defendant, the United States of America, to dismiss. We affirm.

BACKGROUND

Jones is the successor in interest to certain property in Nez Perce County, Idaho, held by the United States as trustee pursuant to the General Allotment Act, ch. 119, 24 Stat. 388 (1887), as amended, 25 U.S.C. § 348 (1982). The county assessed taxes against the property and, when the taxes were not paid, sold the property at a tax sale. The tax sale occurred in 1937. In 1972 Jones sued the county, the tax sale purchasers, the United States, the Secretary of the Interior, and the Commissioner of Indian Affairs to recover the property and damages for the loss of its use. During the pendency of the case, Jones and the United States stipulated to the realignment of the United States as a plaintiff. The plaintiffs prevailed on their claim for return of the property, but were denied damages. On appeal, the United States Court of Appeals for the Ninth Circuit reversed the judgment on damages, but remanded stating that the district court could properly reduce the damages award based on the lack of diligence of the United States in pursuing the claims. The district court reduced the amount of damages proven at trial by

fifty percent. Jones sued the United States in the Claims Court to recover the amount of the reduction.

OPINION

The United States moved pursuant to Cl. Ct. R. 12(b) to dismiss the action for lack of subject matter jurisdiction because the action was time-barred. The Claims Court's general statute of limitations, codified at 28 U.S.C. § 2501 (1982), provides that: "Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." Compliance with the Claims Court's statute of limitations is jurisdictional. *Bray v. United States,* 785 F.2d 989, 992 (Fed. Cir. 1986) (citing cases). Thus, if Jones' claims were not timely, the Claims Court lacked jurisdiction to hear the case.

Jones asserted two claims against the United States: first, that the property was taken for public use without just compensation in violation of the Fifth Amendment of the Constitution; second, that the actions and inaction of the United States with respect to the property breached fiduciary duties owed to Jones by virtue of an express trust arising under the General Allotment Act, 25 U.S.C. §§ 331-390.

Jones' arguments on these points were thoroughly treated in the trial court's opinion filed by Chief Judge Kozinski. It is sufficient to note that the statute of limitations applies to both of Jones' claims. *See United States v. Mottaz,* 106 S. Ct. 2224, 2230 (1986) (statute of limitations applied to breach of fiduciary duty claim under the Quiet Title Act); *Loesch v. United States,* 645 F.2d 905,

924 (Ct. Cl. 1981) (statute of limitations applied to Fifth Amendment taking claim), *cert. denied,* 454 U.S. 1099 (1981), *reh'g denied,* 455 U.S. 984 (1982). The statute of limitations begins to run, by its terms, when a claim accrues.

Generally, an action for breach of fiduciary duty accrues when the trust beneficiary knew or should have known of the breach. *Menominee Tribe of Indians v. United States,* 726 F.2d 718, 720 (Fed. Cir. 1984), *cert. denied,* 105 S. Ct. (1985); G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 951 (rev. 2d ed. 1982) (hereinafter Bogert); *compare United States v. Mottaz,* 106 S. Ct. 2224, 2230 (1986) (discussing the application of an analogous statute of limitations under the Quiet Title Act, 28 U.S.C. § 2409a(f) (1982). It is uncontroverted that under any breach of fiduciary duty theory advanced by Jones, the breach, if any, was known to Jones at least six years prior to filing suit in this case. To the extent that Jones' first amended complaint stated a claim against the United States for taking of property, the alleged taking occurred more than six years prior to the commencement of this case. *See Steel Improvement & Forge Co. v. United States,* 355 F.2d 627, 631 (Ct. Cl. 1966). Consequently, each of the claims was time-barred and the Claims Court lacked jurisdiction to hear them.

We reject Jones' argument that the statute of limitations did not begin to run on her breach of fiduciary duty claim because the United States never clearly repudiated the trust. It is true, as a general proposition, that the statute of limitations does not begin to run with respect to a claim based upon an express trust until there is a clear and

continuing repudiation of the trust. Nevertheless, Jones' interpretation of the term "repudiate" is too narrow. A trustee may repudiate an express trust by words, or, as in this case, by actions inconsistent with his obligations under the trust. *Philippi v. Philippe,* 115 U.S. 151, 157 (1984); Bogert § 951.

The trial court properly dismissed this action for lack of jurisdiction over claims barred by the statute of limitations. Under these circumstances, Jones may seek redress through a private bill presented to Congress, but not before the Claims Court. We do not reach the question whether the Claims Court would have jurisdiction under the Tucker Act, ch. 359, 24 Stat. 505 (1887), as amended, 28 U.S.C. § 1491 (1982), to address a similar claim for breach of fiduciary duty arising out of the General Allotment Act, if such a claim were timely filed. *See United States v. Mitchell,* 463 U.S. 206 (1982); *United States v. Mitchell,* 445 U.S. 535, 540-46 (1979).

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

September 24, 1986

ERRATUM

Appeal No. 86-897

Vera Rogers Jones, The Estate of Ada Rogers Graham, and The Estate of Hattie Davis Rogers v. The United States

Decided September 23, 1986

Please make the following correction:

Page 4, last line of 1st full paragraph,
"(1884)" should be —(1885)—

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

October 8, 1986

ERRATUM

Appeal No. 86-897

Vera Rogers Jones, The Estate of Ada Rogers Graham, and The Estate of Hattie Davis Rogers v. The United States

Decided: September 23, 1986

Please make the following correction:

Page 3, line 5 from the top, change U.S.C. cite to
—25 U.S.C. § 348—

IN THE UNITED STATES CLAIMS COURT

VERA ROGERS JONES, *et al.*,	No. 597-84L
Plaintiffs, v.	Breach of trust, jurisdiction; damages; Indian claims; statute of limitations.
THE UNITED STATES,	
Defendant.	

(Filed December 9, 1985)

Richard Dauphinais, the *Native American Rights Fund,* Washington, D.C., for plaintiffs.

Patricia L. Weiss, with whom was *Assistant Attorney General F. Henry Habicht II,* Washington, D.C., for defendant.

OPINION

KOZINSKI, Chief Judge.

Plaintiffs, members of the Nez Perce Tribe, sue the United States claiming damages for a breach of trust that appears to have been established by earlier judicial proceedings. Defendant moves to dismiss, arguing that the claim is barred by the statute of limitations.

Facts

Plaintiffs are successors in interest to Hattie Davis Rogers who, in 1912, was allotted property in Nez Perce County, Idaho, as part of a disbursement of reservation lands to individual indians. The property was held in trust by the United States pursuant to 25 U.S.C. § 348 (1982). Hattie Davis Rogers was considered a ward of the federal

government and her request that she be vested with title to the property was refused in 1914 because an Indian Service representative doubted she was capable of managing it. At that time she was maintaining a home on the property and producing income by running a small business and renting a portion of her building to a bank.

Shortly thereafter Nez Perce County purported to tax the property. In 1918, the United States, as trustee, obtained a district court decree voiding the tax assessment and enjoining future taxation. Only five years later, the county once again levied a tax on the property. For reasons not clear on this record, *but see* p. 5 n.2 *infra*, the United States did not return to district court to seek enforcement of the 1918 decree, nor did it otherwise protect the property from the illegal tax levy. The property taxes remained unpaid for some years and Hattie Davis Rogers was evicted in 1927. In 1937 the county conveyed the property at a tax sale.

Hattie Davis Rogers died in 1964, dispossessed of her property as she had been for the preceding 37 years. During that period nothing was done to set aside the tax sale or recover the property.

In 1972, plaintiffs brought suit in Idaho district court seeking return of the property and damages; named as principal defendants were the putative property owners, Nez Perce County and the United States. Five years later, the United States was realigned as a party plaintiff and in 1979 the district court granted summary judgment for plaintiffs and ordered the property returned to the United States in trust for the successors of Hattie Davis Rogers. *Brooks v. Nez Perce County*, No. 2-72-27, slip. op. at 1

(D. Idaho Oct. 15, 1979). On appeal, the Ninth Circuit also held that plaintiffs were entitled to damages to compensate them for the illegal use of their property, but noted that the government's lack of diligence in pursuing the claim could be considered in calculating those damages. *Brooks v. Nez Perce County,* 670 F.2d 835 (9th Cir. 1982). The district court found that plaintiffs suffered damages of $216,000 but awarded only half that amount, stating as follows:

> Certainly the [U.S.] government was most dilatory in the exercising of its role as trustee in this matter and this court cannot in good conscience assess full damages for the present value of past income on the property against the taxpayers of Nez Perce County. The court finds that by reason of the foregoing, net damages should be decreased by at least 50 percent rounded off to a damage sum for present value of past income in the sum of $108,000.00.

Brooks v. Nez Perce County, No. 2-72-27, slip op. at 3, (D. Idaho Mar. 3, 1983).

Judgment for plaintiffs was entered in March 1983 and no appeal was taken. Instead, plaintiffs filed suit in this court on November 15, 1984, seeking to recover $108,000 from the United States, the amount by which their district court judgment had been reduced because of the government's failure to bring suit in a more timely fashion.

Contentions of the Parties

Confronted with an apparently established breach of trust, defendant unblinkingly invokes our six-year statute of limitations. 28 U.S.C. § 2501 (1982). Defendant argues that all of the events establishing defendant's liability oc-

curred a long time ago: when defendant first allowed Nez Perce County to levy taxes in violation of the district court decree (61 years before this suit was brought); when defendant allowed the property to be sold by the county to recover the delinquent taxes (47 years before suit); a reasonable time thereafter when Hattie Davis Rogers should have realized that the United States would do nothing to recover her property; or, at the latest, in 1977 when the United States realigned itself as a party plaintiff in the district court litigation, effectively conceding that it had violated its trust responsibility by allowing the land to be taken away from the allottee (some 8 years before the action here was filed). Defendant reminds the court, lest it be lured into error by compelling facts, that "[b]ecause this statute of limitations is an integral part of the federal government's waiver of sovereign immunity, it is jurisdictional, it must be strictly construed and it cannot be waived by this court." Def. Br. 5 (citing *Bevelheimer v. United States*, 4 Cl. Ct. 558, 561 (1984); *Parker v. United States*, 2 Cl. Ct. 399, 402 (1983); *Gerber v. United States*, 2 Cl. Ct. 311, 315 (1983)).

Plaintiffs, through able counsel, have made a valiant effort to overcome the limitations defense. They argue that their claim did not accrue, for statute of limitations purposes, until the district court litigation had been completed and they first learned that they suffered monetary damages because of defendant's breach of trust. Alternatively, plaintiffs argue that the statute of limitations has never even begun to run because their "claim to the fair rental value . . . is the equivalent to a claim for the land itself," Pl. Br. 34, and because the trust relationship between the United States and plaintiffs has never been

repudiated, precluding the running of the statute of limitations.

Discussion

This is an unusual case in that defendant's culpability —the misfeasance upon which plaintiffs' claim is based— appears to be established by an earlier court ruling. This earlier ruling is now final and binding on the parties to this lawsuit. Unlike most cases involving a statute of limitations defense, many of the policies underlying that defense do not apply here: there is no risk that time has clouded memories, that witnesses have died or disappeared, or that evidence has been destroyed. Nevertheless, as defendant points out, the statute of limitations is jurisdictional and the court cannot waive it on grounds of policy or equity.

i. Plaintiffs' claim for breach of trust consists of the government's failure to (1) enforce the 1918 decree enjoining the taxation of the property; (2) block Hattie Davis Rogers' eviction; (3) prevent the tax sale; and (4) seek return of the property once it was sold. The first three of these violations occurred long before this suit was brought far outside the reach of this court's jurisdiction as limited by 28 U.S. § 2501 (1982). The remaining violation—failure to have the property returned—was a continuing breach of trust and plaintiffs might have been able to bring suit for a six year period immediately prior to the filing of the complaint. The continuing breach ended, however, when the United States joined plaintiffs in seeking return of the property; this occurred in 1977, more than six years before suit was filed in this court. While plaintiffs could not be absolutely certain the United States had

committed a breach of trust, or the extent of the damage they might have suffered, this is of no moment. Plaintiffs invariably bring lawsuits without knowing for sure what, if anything, they will recover. For purposes of determining when the statute of limitations began to run, the key points are that (1) the conduct establishing defendant's liability occurred in the distant past, and (2) the facts underlying their claims were known to plaintiffs and their predecessor in interest. *Braude v. United States*, 218 Ct. Cl. 270 (1978); *Spevack v. United States*, 182 Ct. Cl. 884 (1968); *Japanese War Notes Claimants Ass'n v. United States*, 178 Ct. Cl. 630, *cert. denied*, 389 U.S. 971 (1967). That they may not have fully appreciated the legal consequences flowing from defendant's nonfeasance—including the possibility that they might be entitled to money damages—does not toll the statute of limitations. *Menominee Tribe of Indians v. United States*, 726 F.2d 718 (Fed. Cir. 1984), *cert. denied*, 105 S. Ct. 106 (1985); *Affiliated Ute Citizens v. United States*, 199 Ct. Cl. 1004 (1972); *Capoeman v. United States*, 194 Ct. Cl. 664 (1971).

ii. Plaintiffs' argument that the statute of limitations never began to run because of the trust relationship between the United States and Hattie Davis Rogers presents a somewhat closer issue. According to plaintiffs "[t]he 'universal rule' is that the statute of limitations 'does not run against a beneficiary in favor of a trustee until the trust is repudiated and the fiduciary relationship is terminated.'" Pl. Br. 35 (quoting *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973); citing *United States v. Taylor*, 104 U.S. 216 (1881); *Russell v. United States*, 37 Ct. Cl. 113 (1902); *Wayne v. United States*, 26 Ct. Cl. 274 (1891)).

This rule is not applicable where the claim is for damages arising from misfeasance or nonfeasance by the trustee, rather than for recovery of the trust corpus. For example, in *United States v. Taylor* the claim was for money held in trust for more than six years by the Secretary of the Treasury. The Court explained that the six year statute of limitations did not apply because the proceeds belonged to plaintiff, and the Secretary was under a ministerial duty to hand it over upon application: "The person entitled to the money could allow it to remain in the treasury for an indefinite period without losing his right to demand and receive it. It follows that if he was not required to demand it within six years, he was not required to sue for it within that time." 104 U.S. at 221. *Accord Russell,* 37 Ct. Cl. at 117-18; *Wayne,* 26 U.S. at 289-90. The theory of these cases appears to be that money which is conceded to be held in trust is not a debt. Since entitlement to the trust corpus is not in dispute, ownership need not be established by means of lawsuit to which the statute of limitations applies. Only when the trust is repudiated by the trustee, and entitlement to the corpus (or a portion thereof) is claimed adversely to the beneficiary, does the relationship change to that of debtor and creditor, and a lawsuit then becomes necessary to establish entitlement. At that point the statute of limitations begins to run. *Taylor,* 104 U.S. at 222; *Russell,* 37 Ct. Cl. at 118; *Wayne,* 26 Ct. Cl. at 289.

The suit here, for damages arising from misfeasance of the trustee, is fundamentally different from *Taylor, Russell* and *Wayne.* This is not a dispute as to entitlement to a trust corpus that defendant is holding adversely to plaintiffs. Here, the theory of recovery is based upon

damages suffered because of defendant's mishandling of its trust responsibilities, an action akin to breach of contract, as to which the fact and extent of liability would normally be in dispute. G. Bogert, *The Law of Trusts and Trustees* §§ 861-880 (2d ed. 1984). The question is not whether defendant will give plaintiffs what belongs to them but whether it will be forced to indemnify them for losses suffered in dealings with a third party. Such claims are not covered by the rule expressed in *Taylor* or its progeny, and suit thereon must be brought within six years of defendant's breach of trust. *Menominee*, 726 F.2d at 721-22.[1] In any case, defendant's gross and protracted failure to fulfill its fiduciary responsibility constituted an implicit[2] repudiation of the trust relationship, which should have put the beneficiary on notice that she might suffer damages.

Equally unpersuasive is plaintiffs' claim that the suit here is not barred by the statute of limitations because it involves a claim for real property, or its monetary equivalent. This suit is not for recovery of the property or the profits therefrom; that was the subject of the district

---

[1]To the extent that *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1249-50 (N.D. Cal. 1973), suggests a contrary rule, the court is unpersuaded and declines to follow.

[2]There is an indication on this record that the government's failure to protect Hattie Davis Rogers' interest in the property was based upon an *express* repudiation of the trust relationship. *See* Complaint ¶ 15. If that was the case, the rule in *Taylor* would be inapplicable by its own terms. *See Capoeman*, 194 Ct. Cl. at 668.

court action. The property was, in fact, returned to plaintiffs, together with such of the mesne profits as were not barred by the government's conduct. This action is for damages arising from breach of trust and bears no relationship to the land in question or the profits therefrom, except as they establish the measure of damages.

iii. The court has considered and rejected plaintiffs' other arguments. The said fact is that the wrong committed by the United States against its ward, Hattie Davis Rogers, and her successors in interest, occurred a very long time ago, and all of the material facts were known to those wronged. It would do severe violence to our statute of limitations, and the concept of this court's limited jurisdiction, to entertain plaintiffs' claim, attractive as that result might be in light of defendant's established mishandling of its trust responsibilities.

To hold the claim is barred by the statute of limitations does not mean that the United States should not pay plaintiffs the money in question, or some fraction thereof. It does mean that the obligation, if there be one, cannot be satisfied through litigation in this court but must be presented directly to Congress, which retained authority over all claims against the United States that go back more than 6 years or otherwise fall outside our jurisdictional purview. *See Absher v. United States,* No. 494-84C, slip. op. at 9, (Cl. Ct. Dec. 3, 1985); *Flanagan v. United States,* 2 Cl. Ct. 587, *aff'd mem.,* 727 F.2d 1120 (Fed. Cir. 1983).

Conclusion

The clerk is directed to dismiss the complaint. No costs.

December 9, 1985

/s/ Alex Kozinski

wde:mkb

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

VERA ROGERS JONES, THE ESTATE OF ADA ROGERS GRAHAM, and THE ESTATE OF HATTIE DAVIS ROGERS,

Appellants,

v.

THE UNITED STATES,

Appellee.

Appeal No. 86-897

CORRECTED MANDATE

JUDGMENT

ON APPEAL from the United States Claims Court in CASE NO(S). 597-84L

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT
Pamela J. Pwiford, Deputy Clerk
Francis X. Gindhart, Clerk

DATED SEP 23 1986

ISSUED AS A MANDATE: October 29, 1986

COSTS AGAINST THE APPELLANT:

Printing $48.69
TOTAL $48.69

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

VERA ROGERS JONES; the Estate of ADA ROGERS GRAHAM; and the Estate of HATTIE DAVIS ROGERS,

Appellants,

v.

THE UNITED STATES

Appellee.

Appeal No. 86-897

Before RICH, BALDWIN and BISSELL, Circuit Judges.

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

/s/ Francis X. Gindhart, Clerk

10/21/86
Date

cc: Mr. Richard Dauphinais
Ms. J. Carol Williams

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

VERA ROGERS JONES; the Estate of ADA ROGERS GRAHAM; and the Estate of HATTIE DAVIS ROGERS

Appellants,

v.

THE UNITED STATES

Appellee.

Appeal No. 86-897

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT

/s/ Francis X. Gindhart, Clerk

11/5/86
Date

cc: Mr. Richard Dauphinais
Ms. J. Carol Williams, DOJ

APPENDIX F

IN THE UNITED STATES CLAIMS COURT
FILED DEC 10 1985

No. 597-84 L

VERA ROGERS JONES,
et al.

JUDGMENT

v.

THE UNITED STATES

Pursuant to the opinion of December 9, 1985, directing the clerk to dismiss the complaint,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

Frank T. Peartree
Clerk of Court

/s/ By: Debra L. Sanler
Deputy Clerk

December 10, 1985

NOTE: As to appeal, 60 days from this date, see FRAP 4(a)

APPENDIX G

STATUTES INVOLVED

28 U.S.C. § 2501—Time for filing Suit

Every claim for which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

* * *

June 25, 1948, c. 646, 62 Stat. 976; Sept. 3, 1954, c. 1263, § 52, 68 Stat. 1246; as amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 139(a), 96 Stat. 42.

25 U.S.C. § 348—Patents to be held in trust; descent and partition

Upon the approval of the allotments provided for in sections 331-334 of this title, by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made,

* * *

Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.

* * *

February 8, 1887, c. 119 § 5, 24 Stat. 389; March 3, 1901, c. 832, § 9, 31 Stat. 1085.

Supreme Court, U.S.
FILED
MAR 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1163

In the Supreme Court of the United States

OCTOBER TERM, 1986

VERA ROGERS JONES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

PATRICIA L. WEISS
DAVID C. SHILTON
M. ALICE THURSTON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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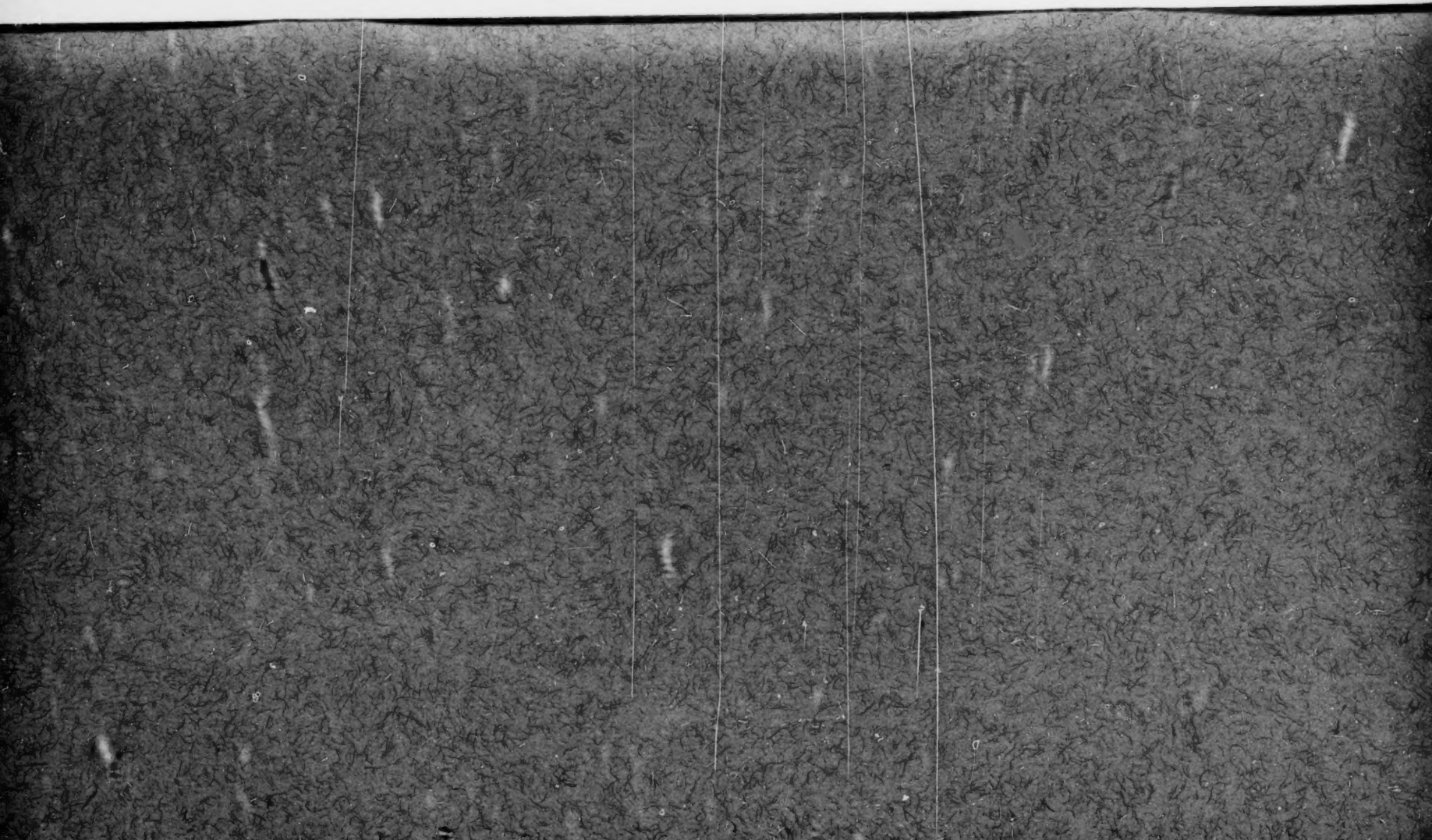

QUESTION PRESENTED

Whether this damage action against the United States, which was filed in 1984 and is based on an alleged breach of fiduciary duty and an uncompensated taking resulting from an unauthorized county tax sale of Indian trust property in 1937, is barred by the six-year statute of limitations in 28 U.S.C. 2501.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1163

VERA ROGERS JONES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 801 F.2d 1334. The opinion of the Claims Court (Pet. App. 7-16) is reported at 9 Cl. Ct. 292.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1986, and a petition for rehearing was denied on October 21, 1986 (Pet. App. 18). The petition for a writ of certiorari was filed on

January 15, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the owners of certain property (known as "Lot 1") in Nez Perce County, Idaho. The property was purchased by the United States in 1912 for Hattie Davis Rogers and was taken into trust pursuant to the General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.*[1] Shortly thereafter, the County attempted to levy taxes on the property, but it was enjoined from so doing in a suit brought by the United States. *United States* v. *Nez Perce County*, 267 F. 495 (D. Idaho 1917); C.A. App. 27-28. In 1923, the County again assessed taxes against the property.[2] The taxes were not paid, and the County sold the property at a tax sale in 1937 to Forrest L. Lisher. Pet. App. 2, 8; C.A. App. 8.

2. In July of 1972, Vera Rogers Brooks and Ada Rogers Graham, successors in beneficial interest to Hattie Davis Rogers, filed suit in the United States District Court for the District of Idaho against Nez Perce County and the successors in interest to Forrest Lisher, seeking return of the property. The United States was not named as a defendant, and the suit was dismissed in 1975 for lack of federal jurisdiction. See *Brooks* v. *Nez Perce County*, 394 F. Supp. 869, 871 (D. Idaho 1975).

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[1] Petitioners are Vera Rogers Jones and the estates of Ada Rogers Graham and Hattie Davis Rogers.

[2] Petitioners alleged in their complaint in the instant case that the United States had erroneously concluded in 1922 that its trust responsibility with respect to the allotment had ceased and "may have informed Nez Perce County that the trust over Hattie Davis' allotment had expired" (C.A. App. 7).

The plaintiffs refiled their suit in district court in 1977, adding as defendants the United States, the Secretary of the Interior, and the Commissioner of Indian Affairs. See Second Amended Complaint, *Brooks, et al.* v. *Nez Perce County, Idaho, et al.*, No. 2-72-27 (D. Idaho, filed July 21, 1977) (C.A. App. 35-43). Later in 1977, petitioners and the United States stipulated to the realignment of the United States as a plaintiff in the *Brooks* case (C.A. App. 8). The district court granted partial summary judgment in favor of the United States on October 15, 1979, quieting title to the property in the United States as trustee and exempting the land from taxation (C.A. App. 54). However, in a separate ruling dated May 13, 1980, the district court held that it would be inequitable to award damages (in the form of mesne profits) against Nez Perce County (C.A. App. 58-62), because those damages "were increased by [the United States' and petitioners'] own inaction" (C.A. App. 60).

The United States Court of Appeals for the Ninth Circuit reversed the district court's holding that the United States was completely barred from recovering damages on petitioners' behalf, but it stated that the "[l]ack of diligence by the government in exercising its role as trustee [could be weighed] in calculating damages." *Brooks* v. *Nez Perce County, Idaho*, 670 F.2d 835, 837 (9th Cir. 1982). On remand, the district court found that the present value of the income lost between 1937 and 1979 was $216,000, and it concluded that this amount should be reduced by approximately 50% because of the delay in recovering the property. The court therefore awarded petitioners $108,000 in damages. *Brooks* v. *Nez Perce County*, No. 2-72-27 (D. Idaho Mar. 3, 1983) (C.A.

App. 66-70); Pet. App. 2-3, C.A. App. 9. Neither petitioners nor the United States took an appeal from the district court's decision.

3.a. On November 15, 1984, petitioners filed the instant action in the United States Claims Court seeking a money judgment against the United States in the amount by which the district court reduced the damage award in *Brooks*. Petitioners alleged that Lot 1 had been taken for a public use without just compensation (C.A. App. 9-10) and that the United States had breached its fiduciary duties as a result of its failure to: "(1) enforce the 1918 decree enjoining the taxation of the property; (2) block Hattie Davis Rogers' eviction [in 1927]; (3) prevent the tax sale [in 1937]; and (4) seek return of the property once it was sold" (Pet. App. 11).

The Claims Court granted the United States' motion to dismiss, holding that this suit is barred by the six-year statute of limitations in 28 U.S.C. 2501 (Pet. App. 7-16). The Claims Court noted that the first three breaches of trust alleged by petitioners occurred long before the suit was brought. By contrast, the court believed that the last alleged violation—the United States' failure to seek return of the property—was a continuing breach of trust. However, in the court's view, this continuing breach terminated in 1977, when the United States was realigned as a plaintiff in the *Brooks* litigation and joined with petitioners in seeking return of the property. Because that realignment also occurred more than six years before the instant suit was filed, the court held that that claim too is barred by 28 U.S.C. 2501. The court rejected petitioners' contention that petitioners could not have filed suit in 1977 because they did not know at that time the amount of dam-

ages (if any) that they would recover from Nez Perce County. The court explained that the fact that petitioners "may not have fully appreciated the legal consequences flowing from defendant's nonfeasance—including the possibility that they might be entitled to money damages—does not toll the statute of limitations" (Pet. App. 12 (citations omitted)).

b. The United States Court of Appeals for the Federal Circuit affirmed (Pet. App. 1-6). The court reasoned that the statute of limitations, by its terms, begins to run when a claim "accrues" (28 U.S.C. 2501) and that an "action for breach of fiduciary duty accrues when the trust beneficiary knew or should have known of the breach" (Pet. App. 4). Here, the court explained, under any of petitioners' theories, they knew of the breach of fiduciary duty at least six years before this suit was filed (*ibid.*). The court specifically rejected petitioners' argument that the statute of limitations never began to run on their breach of fiduciary duty claim because the United States had not repudiated the trust. In the court's view, the trust was repudiated "by actions inconsistent with [the government's] obligations under the trust," and the running of the statute of limitations thus was triggered by those actions (*id.* at 4-5). The court of appeals also found that the alleged taking of property occurred more than six years prior to the commencement of this action and that petitioners' taking claim therefore is also barred (*ibid*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Petitioners simply challenge the court of appeals' application of the six-year statute of limitations to the particular circumstances of this case. This challenge raises no issue of general importance warranting review by this Court.

1. Petitioners have not stated a proper claim against the United States for a "taking" of property, and their taking claim is time-barred in any event.

a. The United States in this case engaged in no taking of property within the meaning of the Fifth Amendment. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *United States* v. *Dickinson*, 331 U.S. 745, 748 (1947). See also *Pete* v. *United States*, 531 F.2d 1018, 1031 (Ct. Cl. 1976). Here, however, the United States neither acquired the property for its own benefit (compare *United States* v. *Mottaz*, No. 85-546 (June 11, 1986)) nor imposed restrictions on the use and enjoyment of it by petitioners and their predecessors in interest (compare *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 4-7). Rather, the United States acquiesced in action by others—officials of Nez Perce County—who first taxed the property and then later sold it to third parties. The mere failure by officials of the United States to take action to prevent or undo the actions of a county government is not a "taking" of property by the United States that would trigger an obligation on the part of the United States under the Fifth Amendment to pay compensation.

Furthermore, petitioners contend that the inaction of United States officials with respect to the property was unlawful under 25 U.S.C. 348, which required the United States to hold the property in trust. It is well settled, however, that unlawful or unauthorized conduct by governmental officials does not constitute a taking of property by the United States within the meaning of the Fifth Amendment. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1017 (1984); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127 n.16 (1974); *Yearsley* v. *Ross Construction Co.*, 309 U.S. 18, 21 (1940); *Hooe* v. *United States*, 218 U.S. 322, 336 (1910). Accordingly, the alleged violation by the responsible governmental officials of their statutory duties with respect to the property at issue in this case does not give rise to a claim under the Tucker Act to obtain the compensation that would be owed for a statutorily authorized "taking" of property.

b. Even if petitioners had stated a proper taking claim, their claim would be barred by the statute of limitations in 28 U.S.C. 2501. Under that statute, a claim must be brought within six years of the date on which it "first accrues." If we assume arguendo that the unlawful tax sale of the property by Nez Perce County constituted a taking by the United States, petitioners' taking claim accrued on the date of that sale, in 1937. See *Soriano* v. *United States*, 352 U.S. 270, 277 (1957); *United States* v. *Dow*, 357 U.S. 17 (1958). The phrase "*first* accrues" in fact underscores that the six-year period begins to run from the date on which the plaintiff first has a right to sue (*Soriano*, 352 U.S. at 275). In this case, there was nothing to prevent petitioners' predecessor in interest, Hattie Davis Rogers, from bringing an

action immediately after the tax sale, either against the County and the purchaser to have the tax sale set aside or against the United States alleging a taking of her property.

Petitioners nevertheless contend that the statute of limitations did not begin to run until "the United States first took an unequivocal position as to Lot 1 and took the action on that position [in the *Brooks* litigation] that resulted in the return of Lot 1 in 1979"; prior to that time, petitioners argue, "the government's failure to take a firm stand created uncertainty" (Pet. 10). However, this suit would be time-barred even under petitioners' novel view of the statute of limitations, because it was when the United States was realigned as a plaintiff in the *Brooks* litigation that it took a firm position that the 1937 tax sale was void and that petitioners retained title to Lot 1. The realignment, to which petitioners stipulated, took place in 1977, more than six years before this suit was filed in November 1984.

Moreover, any taking of property that resulted from the tax sale of the property by the County was completely accomplished by the seemingly absolute and permanent divestment of Hattie Davis Rogers' title. There accordingly was no "uncertainty" about the sale that would have prevented petitioners from suing the United States (or the County and the purchaser) in 1937. If anything, the United States' realignment as a plaintiff in the *Brooks* litigation *created* uncertainty about the validity of the tax sale. In any event, in *United States* v. *Kubrick*, 444 U.S. 111, 118-125 (1979), the Court rejected the notion that the running of the statute of limitations is tolled simply because the plaintiff might be uncertain or unaware of the legal basis of his claim.

Petitioners attempt to avoid this result by arguing that the taking resulting from the tax sale was only "temporary" and that their claim did not accrue until the district court quieted title in the United States in 1979, because it was not until then that "the extent and duration of the taking [were] fixed" (Pet. 9). This argument is without merit. Rogers' loss of the property in 1937 was not "temporary." The tax sale obviously was intended to accomplish a complete and permanent divestment of Rogers' title. Accordingly, the extent and duration of the alleged taking were fixed in 1937. Any taking claim against the United States became forever time-barred six years later. The taking claim was not revived by the United States' agreement with petitioners in 1977 that the 1937 sale was void.

The foregoing discussion demonstrates why petitioners' reliance on *United States* v. *Dickinson*, 331 U.S. 745 (1947), is misplaced. *Dickinson* involved a taking claim based on the flooding of property that was caused by the construction of a dam. The question was whether the property was taken when the dam was built, when the lands were first flooded, or when the lands were permanently flooded. *Id.* at 746-747. The Court found that "the source of the entire claim—the overflow due to rises in the level of the river—was not a single event; it was continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized." *Id.* at 749. In this case, the situation giving rise to a cause of action became "stabilized" not when damages were awarded in *Brooks*, but at the time of the tax sale in 1937. At that point, no additional events were necessary to es-

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tablish an invasion—indeed, a divestiture—of Rogers' rights. Even if the *Brooks* litigation had been commenced immediately after the tax sale, that on-going litigation would not have had "the quality of continuing events that *Dickinson* contemplated in its holding that the cause does not accrue 'until the situation becomes stabilized.'" *Alder* v. *United States*, 785 F.2d 1004, 1008 (Fed. Cir. 1986), cert. denied, No. 85-1938 (Oct. 6, 1986), quoting *Dickinson*, 331 U.S. at 749. A fortiori, petitioners cannot rely on the allegedly "destabilizing" effect of parallel litigation in view of the failure by petitioners or their predecessors in interest to file the *Brooks* suit until 35 years later.[3]

2. Petitioners' claim based on an alleged breach of fiduciary duty also is time-barred.[4]

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[3] Neither *Castro* v. *United States*, 500 F.2d 436 (Ct. Cl. 1974), nor *Oro Fina Consolidated Mines, Inc.* v. *United States*, 92 F. Supp. 1016 (Ct. Cl. 1950), cert. denied, 341 U.S. 948 (1951), upon which petitioners rely (Pet. 11), supports their position. In those cases, the duration and extent of the taking were uncertain and were tied to a non-judicial determination by Executive officials, and the dispossessed owners were without judicial recourse to terminate the "taking" and bring about an ascertainment and award of compensation. Here, by contrast, petitioners did not have to wait until 1972 to bring suit to recover the property or until 1984 to sue the United States to recover a money judgment, and the extent and duration of dispossession were in no way tied to the award of damages in *Brooks*. In any event, any inconsistency between the decision by the Federal Circuit in the instant case and the decisions by the Federal Circuit's predecessor, the Court of Claims, in *Castro* and *Oro Fina* is merely an intracircuit conflict that does not warrant review by this Court.

[4] Contrary to the Claims Court's apparent view, the fact that the tax sale was found in the *Brooks* litigation to have violated the restraints on alienation imposed by the General Allotment

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a. As an initial matter, petitioners err in asserting (Pet. 12-13) that completion of the *Brooks* litigation was a condition precedent to this suit. Even in the absence of that litigation, petitioners would have been entitled to assert in a Tucker Act suit against the United States: (1) that Rogers held title to the land; (2) that the United States had a statutory duty to seek return of the land; and (3) that petitioners had a claim of title sufficient to impose a duty on the United States to assert that title on their behalf. No litigation against third parties in district court was necessary in order for petitioners to make those assertions. Compare *United States* v. *Mason*, 412 U.S. 391 (1973). But even if such litigation were necessary, petitioners or their predecessors in interest could have filed the instant suit against the United States on a protective basis, and thereby put the United States on notice of their claim, on or before the date on which they filed the *Brooks* case.[5]

Act does not necessarily establish an actionable breach of fiduciary responsibility by the United States. A trustee, including the United States in its capacity as trustee for Indians, does not act as an insurer of trust property. In order to establish a breach of trust, petitioners would be required to prove that the responsible Interior Department officials failed to exercise the care and skill that a person of ordinary prudence would exercise in dealing with his own property. *United States* v. *Mason*, 412 U.S. 391, 398 (1973). In the present context, that would requiring a showing, inter alia, that the alleged determination in 1922 that the United States' trust responsibility with respect to Lot 1 had terminated (see note 2, *supra*) was unreasonable.

[5] Petitioners err in relying (Pet. 12-13) on *Fehl* v. *United States*, 59 Ct. Cl. 682, 683 (1924), and *Bayshore Resources Co.* v. *United States*, 2 Cl. Ct. 625, 636 (1983), for the proposition that the statute of limitations did not run in this case because

In both *Crown Coat Front Co.* v. *United States*, 386 U.S. 503 (1967), and *Nager Electric Co., Inc.* v. *United States*, 368 F.2d 847 at 855-857 (Ct. Cl. 1966), relied upon by petitioners (Pet. 13), the statute of limitations was held not to run while *administrative* proceedings were ongoing. But in those cases, the final administrative decision was subject to judicial review in the relevant judicial proceedings, and principles of exhaustion of administrative remedies therefore supported the conclusion that the statute of limitations did not begin to run until that final decision was rendered. But "[i]t is only when pursuance of administrative remedies is a prerequisite to suit that the statute of limitations is suspended or tolled by such pursuance." *Steel Improvement & Forge Co.* v. *United States*, 355 F.2d 627, 631 (Ct. Cl. 1966) (citation omitted). See also *Hannon* v. *United States*, 3 Cl. Ct. 89 (1983), aff'd, 732 F.2d 168 (Fed. Cir. 1984); *Sharp* v. *United*

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they were first required to establish valid title to the property in the *Brooks* litigation. In *Fehl*, the court in fact dismissed the claim for just compensation because the petition alleged facts showing that the statute of limitations had run (59 Ct. Cl. at 683). The court further implied that the complaint also was defective because it did not allege who was the owner of the property prior to the tax sale (*ibid.*), although the court did not suggest that it would have been necessary to decide that question in separate litigation in district court, as petitioners maintain here. In *Bayshore Resources*, the court likewise found the suit to be time-barred (2 Cl. Ct. at 632-633). The court held in the alternative that in order to recover, the plaintiffs must show that they "held valid unpatented mining claims" (*id.* at 636). However, that precise issue had been decided adversely to the plaintiffs in other litigation and relitigation was barred by res judicata (*ibid.*). Once again, the court did not suggest that other litigation was a condition precedent to the Tucker Act suit.

States, 207 Ct. Cl. 975, 976-977 (1975); *Reynolds Metal Co.* v. *United States*, 438 F.2d 983, 985 (Ct. Cl.), cert. denied, 404 U.S. 825 (1971). A fortiori, where, as here, no administrative proceedings are involved, the statute of limitations was not tolled. The exhaustion principles found significant in *Crown Coat* and *Nager* are inapplicable in the context of parallel judicial proceedings, and the final judgment entered by the district court in *Brooks* was not subject to judicial review by the Claims Court in this Tucker Act suit.

b. Petitioners also err in arguing (Pet. 15-17) that the statute of limitations was not triggered because of the existence of a trust relationship between the United States and petitioners. In *United States* v. *Mottaz*, No. 85-546 (June 11, 1986), the Court found that the 12-year statute of limitations under the Quiet Title Act (QTA), 28 U.S.C. 2409a(f), barred an action against the United States by a Chippewa Indian based on an allegedly wrongful alienation of her property by the United States. In so doing, the Court explicitly held that although federal law provides Indians with a range of special protections, waivers of sovereign immunity may not be lightly implied even in favor of Indians. Accordingly, the Court held that the statute of limitations in 28 U.S.C. 2409a(f), which applies to "[a]ny civil action" under the QTA, is fully applicable to suits by Indians. Slip op. 8-9, 16-17.

These same principles apply to suits in the Claims Court. Under 28 U.S.C. 2501, "[*e*]*very* claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first occurs" (emphasis added). This all-encompassing language

clearly applies to suits by Indians. It also is significant that the third paragraph of 28 U.S.C. 2501 provides an explicit exception for situations in which the plaintiff is "under legal disability or beyond the seas at the time the claim accrues." Congress's inclusion of this express exception reinforces the conclusion that no other exceptions were intended. See *Soriano* v. *United States*, 352 U.S. at 272-274; *Kendall* v. *United States*, 107 U.S. 123, 125 (1882). There is no suggestion in this case that either Rogers or petitioners were under a legal disability that would have prevented them from resorting to the courts immediately after 1937. See, *e.g.*, *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 368-369 (1968).

Moreover, petitioners' argument (Pet. 16-17) that the trust relationship between Indians and the federal government renders statutes of limitations inapplicable has been consistently rejected by the Federal Circuit. See, *e.g.*, *Menominee Tribe* v. *United States*, 726 F.2d 718 (Fed. Cir. 1984); *Hydaburg Co-Op. Ass'n* v. *United States*, 667 F.2d 64, 69-70 (Ct. Cl. 1981), cert. denied, 459 U.S. 905 (1982); *Pitt River Tribe* v. *United States*, 485 F.2d 660, 664 (Ct. Cl. 1973), cert. denied, 419 U.S. 831 (1974); *Capoeman* v. *United States*, 440 F.2d 1002 (Ct. Cl. 1971); *Mitchell* v. *United States*, 10 Cl. Ct. 63, 67-69 (1986). Nor has any other court of appeals recognized an Indian exception to statutes of limitations. See *Loring* v. *United States*, 610 F.2d 649, 650 (9th Cir. 1979); *Christensen* v. *United States*, 755 F.2d 705, 706-707 (9th Cir. 1985), cert. denied, No. 85-372 (June 16, 1986).

Petitioners assert (Pet. 16), however, that under a "universal rule," the statute of limitations does not run against a beneficiary in favor of a trustee

until the trust is repudiated. Petitioners rely (Pet. 16) on *United States* v. *Taylor*, 104 U.S. 216 (1881); *Wayne* v. *United States*, 26 Ct. Cl. 274 (1891); and *Russell* v. *United States*, 37 Ct. Cl. 113 (1902). However, as the Court of Claims observed in *Capoeman* v. *United States*, 440 F.2d 1002, 1003 (Ct. Cl. 1971), those cases "all involved liquidated claims for which money had been appropriated and the validity of which was uncontested." In such a situation, the United States holds the funds in question for the beneficiary and is under a continuing duty to make them available upon demand. As a result, the beneficiary is under no obligation to make such a demand within any particular period of time. *United States* v. *Taylor*, 104 U.S. at 221-222. However, the statute of limitations *would* begin to run in such a situation if the beneficiary made a demand that the money be paid or used for his benefit and the responsible government official declined to do so. *Id.* at 222; *Wayne* v. *United States*, 26 Ct. Cl. at 289; *Russell* v. *United States*, 37 Ct. Cl. at 118. That result would be but a particular application of the established rule that where property is held under an "express trust," the statute of limitations begins to run when the trustee repudiates that trust. *United States* v. *Taylor*, 104 U.S. at 222; *Papasan* v. *Allain*, No. 85-499 (July 1, 1986), slip op. 13 n.12.

In this case, petitioners do not seek to recover a liquidated sum of money already appropriated and held for their benefit, where the government does not contest the validity of their claim. Rather, they seek damages for a past breach of fiduciary duty in circumstances in which the United States does not concede that it had a duty to act. Moreover, there plainly was a repudiation of the trust relationship

by virtue of the United States' acquiescence in the tax sale in 1937 and for many years thereafter. As the court of appeals observed, "[a] trustee may repudiate an express trust by words, or, as in this case, by actions inconsistent with his obligations under the trust" (Pet. App. 5). In this respect, the instant case is again like *Mottaz*. There, the property allegedly was improperly conveyed by the United States out of a trust status that the plaintiff contended was still in existence, but the Court nevertheless held that the suit was barred by the statute of limitations.[6]

3. Finally, and contrary to petitioners' contention (Pet. 13-15), petitioners have not stated a cause of action for indemnity. The rule as to indemnity is that "[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful

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[6] Petitioners' discussion (Pet. 15-16) of *Ewert* v. *Bluejacket*, 259 U.S. 129 (1922), which involved an action to recover land or its monetary equivalent, is irrelevant. This action is one for damages arising from governmental inaction; it is not an action for money damages in lieu of land. The property itself was returned to petitioners in the *Brooks* litigation. In any event, petitioners err in contending that *Ewert* v. *Bluejacket* stands for the proposition that a federal statute of limitations never begins to run if the underlying transaction is void. *Ewert* held only that a *state* statute of limitations did not bar a suit brought by an Indian to recover land that had been sold in violation of a federal statutory restriction. As this Court made clear in *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 240 n.13 (1985), the holding in *Ewert* rested on the principle that under the Supremacy Clause, state-law time bars do not apply of their own force to Indian land title claims.

nature of his conduct." Restatement of Restitution and Unjust Enrichment § 76 (Proposed Final Draft 1936). The *Brooks* litigation, however, did not determine a duty or liability owed *by* petitioners that should have been discharged by the United States; rather, it determined the liability of Nez Perce County *to* petitioners. Petitioners accordingly have paid no judgment for which they might claim a right to be indemnified. Indeed, the principle governing the amount recoverable in an indemnification action compels the conclusion that no action for indemnification lies here. Reimbursement is "limited (a) to the amount of [one's] net outlay properly expended * * * and (b) if the payor became a party to the transaction without the consent or fault of the other, to the amount by which the other has thereby benefited." Restatement of Restitution and Unjust Enrichment § 580 (Proposed Final Draft 1936). Petitioners have made no "net outlay," and the United States has not benefited from any expenditure by petitioners.

Consequently, petitioners' reliance (Pet. 15) on an indemnity theory in support of the argument that their cause of action did not accrue until 1983, when the judgment in *Brooks* awarded less than the claimed aggregate fair market rental value, is without foundation. In indemnity or contribution actions such as *Keleket X-Ray Corp.* v. *United States*, 275 F.2d 167 (D.C. Cir. 1960), and *Central Rivers Towing, Inc.* v. *City of Beardstown*, 750 F.2d 565 (7th Cir. 1984), cited by petitioners (Pet. 14), the cause of action does not ordinarily accrue until the indemnitee's liability to a third party is fixed, since no "loss" is suffered before then. See *ITT Rayonier, Inc.* v. *Southeastern Maritime Co.*, 620 F.2d 512, 514 (5th Cir. 1980); *Austin* v. *North America Forest*

Products, 656 F.2d 1076, 1086 (5th Cir. 1981). Here, by contrast, the "loss" to Rogers and her successors in interest occurred in 1937, when the property was sold; it did not stem from the judgment in the *Brooks* litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

PATRICIA L. WEISS
DAVID C. SHILTON
M. ALICE THURSTON
Attorneys

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Vera Rogers Jones, *et al.*,
Petitioners,
v.
The United States of America,
Respondent.

PETITIONERS' REPLY BRIEF

RICHARD DAUPHINAIS
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036
(202) 785-4166
Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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ARGUMENT

The relevant facts in this case are undisputed. Although petitioners' land, Lot 1, was held in trust by the United States and was the subject of a court order forbidding its taxation, the United States allowed Nez Perce County, Idaho to illegally tax and sell it. Petitioners obtained the return of the land in 1979. The damages the petitioners were entitled to for the temporary loss of their land were reduced in 1983 specifically because of the United States' failure to act sooner than it did. Petitioners then filed this suit in 1984 for the damages they should have received but for the government's delay.

1. As we have shown, under decisions of the Court of Claims petitioners' temporary taking claim could not have accrued until Lot 1 was returned to them in 1979. The United States has responded by arguing that petitioners have not stated a proper taking claim and that, in any event, such a claim accrued no later than 1937 when the County sold Lot 1.

a. The only ground upon which the United States moved to dismiss this case was failure to comply with the statute of limitations. At each stage of these proceedings, however, we have shown that petitioners have a valid temporary taking claim. In allowing the County to tax and sell Lot 1, the United States, in effect took petitioners' property. The rather unique circumstances of this case do not negate the fact that there was an actionable taking.

It cannot be said that there was no authorization. The government's actions "cannot be characterized as unauthorized merely because they may have been mistaken, imprudent or wrongful." *Eyherabide v. United States,*

345 F.2d 565, 570 (Ct.Cl. 1965). And, in refusing, temporarily, to do something to recover the land, the government in effect confirmed and ratified the taking. *See United States v. Creek Nation*, 295 U.S. 103, 110 (1935); *Shoshone Tribe v. United States*, 299 U.S. 476, 495-496 (1937). The fact that Lot 1 was not lost permanently is of no consequence. Temporary takings are recognized in the law of eminent domain. *R.J. Widen Company v. United States*, 357 F.2d 988, 996 (Ct.Cl. 1966); *cf. Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 888 (Fed. Cir. 1983). Finally, even though it was a third party that received the benefits of Lot 1, under these circumstances the government is liable just as if it used the property for itself. *Eyherabide, supra*, 345 F.2d at 570. Although Lot 1 was subject to the control and management of the government, "that did not enable the United States to give tribal lands to others, . . . without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.'" *Creek Nation, supra*, 295 U.S. at 110; *see also Shoshone Tribe, supra.*

b. Under *United States v. Dickinson*, 331 U.S. 745, 749 (1947), a taking cause of action does not accrue until the situation giving rise to the cause of action becomes stabilized. The United States says that the *Brooks v. Nez Perce County*, No. 2-72-27, litigation did not have the quality of continuing events contemplated by this Court in *Dickinson.*

Our point, however, is not that there was no accrual because of the *Brooks* litigation. Our argument is that there was no stabilization until Lot 1 was returned to peti-

tioners. That is precisely the holding of two Court of Claims decisions. *Castro v. United States,* 500 F.2d 436 (Ct.Cl. 1974); *Oro Fina Consolidated Mines, Inc. v. United States,* 92 F.Supp. 1016 (Ct.Cl. 1950) *cert. den.* 341 U.S. 948 (1951). The United States recognizes the possible inconsistency between those decisions and the Federal Circuit's decision in this case. Such an inconsistency, though, raises "merely an intracircuit conflict . . ." (United States' Brief at 10 n.3).

What the United States fails to acknowledge is that the Federal Circuit is a nationwide circuit. A conflict within the Federal Circuit affects litigants and claimants across the country. In addition, because of the similarity in language and subject-matter between 28 U.S.C. sec. 2501 and 28 U.S.C. sec. 2401, the correct interpretation of sec. 2501 would affect claims against the United States brought in the district courts of all of the other circuits.

2. Petitioners have shown that the other causes of action supported by the facts of the case are not barred by the statutes of limitations. In response to those arguments, the United States argues that the *Brooks* litigation was not a condition precedent to this suit. The United States also asserts that petitioners cannot state an indemnity claim.

a. The government states that petitioners could have filed a Tucker Act suit against it asserting: (1) that Hattie Rogers had title to Lot 1; and (2) that the United States had a duty to seek return of Lot 1. The United States fails to explain how that suit could have been filed without a determination that petitioners held valid title to Lot 1. It is beyond doubt that had petitioners filed such a suit, the United States would have challenged the assertion that

petitioners had title to Lot 1. It is disingenuous for the government to now suggest that it would not have defended a Tucker Act suit on that basis. Clearly, the establishment of petitioners' title to Lot 1 in the *Brooks* case was a condition precedent to this case.

The United States also suggests that even if title had to be established in *Brooks,* this case could have been filed on a protective basis. In essence, the government argues that petitioners were required to litigate a title suit in Idaho and, at the same time, file a case in the Court of Claims. The statute of limitations should not be interpreted to place such a burden on litigants. This Court has, in fact, stated that claimants will not be required to file premature protective suits. *Crown Coat Front Co. v. United States,* 368 U.S. 503, 514 (1967).

b. Although the statute of limitations was the only basis for the United States' motion to dismiss, petitioners have shown in the Claims Court and the Court of Appeals that the facts of this case support an indemnity cause of action. The government's rigid statement of the elements of an indemnity cause of action is incorrect.

Where a person is compelled to pay damages occasioned by another, an implied indemnity cause of action can be maintained. *See e.g., National Indemnity Company v. United States,* 444 F.Supp. 1356, 1360 (C.D. Cal. 1977) *affirmed Rudelson v. United States,* 602 F.2d 1326 (9th Cir. 1979). The claim is based on the principle that in such a situation equity and good conscience require that the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought. *Id.; see also Flunker v. United*

States, 528 F.2d 239 (9th Cir. 1975). Further, it is a valid cause of action under the laws of Idaho, where Lot 1 is located. *Griggs v. Safeco Insurance Co. of America,* 103 Idaho 790, 654 P.2d 378 (1982); *May Trucking Co. v. International Harvester Co.,* 97 Idaho 319, 543 P.2d 1159 (1975).

The facts of this case support an indemnification claim. As has been recounted, there was a favorable title decision and a finding that petitioners were entitled to damages. At that point, the County asserted the United States' failure to act sooner. And, at the direction of the Ninth Circuit, the Idaho district court reduced the damages the petitioners were entitled to because the government "was most dilatory in exercising its role as trustee." compensate the County for the failures of the United *Brooks, supra.* In fact, the petitioners were forced to States. The petitioners now sue the government for that which they were forced to pay the County. The claim is one for indemnity. And, under the rules relating to indemnity causes of action, petitioners' claim did not accrue until the 1983 damages decision in *Brooks.*

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CONCLUSION

In summary, under any theory of liability the statute of limitations did not run before this case was filed in November, 1984. In addition, as the Claims Court recognized the reasons for application of the statute of limitations fall away in this case.

> "[D]efendant's culpability appears to be established by an earlier court ruling. This earlier ruling is now final and binding on the parties to this lawsuit. Unlike most cases involving a statute of limitations defense, many of the policies underlying that defense do not apply here: there is no risk that time has clouded memories, that witnesses have died or disappeared, or that evidence has been destroyed.

Jones v. United States, 9 Cl.Ct. 292, 295 (1985). The decisions of the lower courts should be reviewed.

Respectfully submitted,

Richard Dauphinais
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036
(202) 785-4166

Counsel of Record for Petitioners

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